

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT C. ALBANESE, DENNIS	§	
M. BONE, DOREEN R. BYRNES,	§	
DOMENICK A. CAMA, PETER H.	§	
CARLIN, WILLIAM V.	§	
COSGROVE, KEVIN CUMMINGS,	§	No. 240, 2020
JAMES J. GARIBALDI, MICHELE	§	
N. SIEKERKA, PAUL N.	§	
STATHOULOPOULOS, and JAMES	§	
H. WARD,	§	
	§	
Defendants Below,	§	
Appellants,	§	
	§	
v.	§	Court Below – Court of Chancery
	§	of the State of Delaware
ROBERT ELBURN, derivatively on	§	
behalf of INVESTORS BANCORP,	§	C.A. No. 2019-0774-JRS
INC. and individually and on behalf	§	
of himself and all other similarly	§	
situated stockholders of INVESTORS	§	
BANCORP., INC.,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: July 23, 2020
Decided: August 20, 2020

Before **SEITZ**, Chief Justice; **TRAYNOR** and **MONTGOMERY-REEVES**,
Justices.

ORDER

Upon careful consideration of the notice of interlocutory appeal, its exhibits, and the Court of Chancery's order denying the application for certification of an interlocutory appeal, it appears to the Court that:

(1) This appeal arises from a Court of Chancery decision denying the motion to dismiss filed by the defendants below. The following events preceded the ruling.

(2) In 2016, Robert Elburn brought a derivative action alleging that the members of the board of directors ("the Board") of Investors Bancorp, Inc. ("the Company") had breached their fiduciary duties by awarding substantial restricted stock awards ("RSAs") and stock options (collectively, "the 2015 Awards") to certain directors under the terms of a stockholder-approved equity incentive plan ("the EIP"). Kevin Cummings, a Board member and the Company CEO, and Domenick Cama, a Board member and the Company President and COO, were the largest beneficiaries of the EIP. The defendants moved to dismiss the complaint, and the Court of Chancery granted the motion. On appeal, we reversed and remanded for further proceedings.¹

(3) Prior to trial, the parties reached a settlement agreement ("the Settlement"). Under the Settlement, the 2015 Awards to Cummings and Cama were rescinded and the 2015 Awards to the non-executive members of the Board were

¹ *In re Inv'rs Bancorp., Inc. S'holder Litig.*, 177 A.3d 1208 (Del. 2017).

substantially reduced. Before the Settlement was presented to the Court of Chancery for approval, the Company filed its Proxy Statement for its 2019 Annual Stockholders Meeting at which director elections were to be held. The Proxy Statement advised the stockholders that the Board intended to consider the issuance of new awards to Cummings and Cama under the EIP (“the Replacement Awards”). Shortly thereafter, the Board approved the Replacement Awards for Cummings and Cama. Notably, the Replacement Awards were similar in scope to the 2015 Awards that Cummings and Cama had agreed to forfeit under the Settlement. The Company did not file a supplemental disclosure to reflect the Board’s actual approval of the Replacement Awards prior to the director elections. The Court of Chancery subsequently approved the Settlement, and the Replacement Awards were granted.

(4) Thereafter, Elburn filed a complaint (the “Complaint”) asserting derivative claims and a direct claim on behalf of himself and a putative class of the Company’s stockholders. The Complaint alleges that Robert Albanese, Dennis Bone, Doreen Byrnes, Domenick Cama, Peter Carlin, William Cosgrove, Keving Cummings, James Garibaldi, Michele Siekerka, Paul Stathoulopoulos, and James Ward III (collectively, the “Defendants”)—each a member of the Company’s Board—breached their fiduciary duties by approving the Replacement Awards. The Defendants moved to dismiss the Complaint for failure to plead demand futility under Court of Chancery Rule 23.1 (“Rule 23.1”) and failure to state a viable claim

under Court of Chancery Rule 12(b)(6). On April 21, 2020, the Court of Chancery issued an opinion denying the Defendants’ motion to dismiss (the “Opinion”). In the Opinion, the Court of Chancery concluded that the Complaint had (i) pled with particularity the existence of an illicit *quid pro quo* agreement that led to the Replacement Awards and (ii) adequately alleged demand futility under Rule 23.1 because it pled, with particularity, sufficient facts to raise a reasonable doubt that a majority of the Board would have been able to impartially consider a litigation demand.

(5) On July 2, 2020, Defendants asked the Court of Chancery to certify an interlocutory appeal from the court’s opinion.² Defendants maintained that the Opinion decided a substantial issue of material importance.³ Defendants also argued that the following Rule 42(b)(iii) factors weighed in favor of granting interlocutory review: the Opinion resolves a substantial question of Delaware corporate law for the first time;⁴ the Opinion adopts a new pleading standard that conflicts with other decisions of the trial courts;⁵ the Opinion relates to the construction of a court rule that has not been settled by the Court;⁶ the Opinion sustained the controverted

² The Defendants’ application was timely under this Court’s emergency order extending deadlines through July 1, 2020, due to the COVID-19 pandemic.

³ Del. Supr. Ct. R. 42(b)(i).

⁴ Del. Supr. Ct. R. 42(b)(iii)(A).

⁵ Del. Supr. Ct. R. 42(b)(iii)(B).

⁶ Del. Supr. Ct. R. 42(b)(iii)(C).

jurisdiction of the Court of Chancery;⁷ and interlocutory review would serve considerations of justice.⁸ Elburn opposed the application.

(6) On July 21, 2020, the Court of Chancery denied the Defendants' application for certification of an interlocutory appeal. The Court of Chancery ruled that it had not decided a substantial issue of material importance—a threshold consideration under Rule 42(b)(i)—because it did not decide an issue related to the merits of the case but merely concluded that the Complaint adequately pled that an improper *quid pro quo* arrangement existed and that those allegations supported a finding of demand futility. Second, the Court of Chancery rejected the Defendants' assertions that the Opinion decided either an issue of first impression or was in conflict with precedent. Rather, the Court of Chancery concluded that the Opinion had only applied settled law to the specific allegations set forth in the Complaint to determine that Elburn had pled demand futility under any definition of particularity. Third, the Court of Chancery noted that an interlocutory appeal would not terminate the litigation because the Complaint also asserts a direct disclosure claim that would not be affected by interlocutory review. Under the circumstances, the Court of Chancery determined that the Opinion did not decide a substantial issue of material

⁷ Del. Supr. Ct. R. 42(b)(iii)(D).

⁸ Del. Supr. Ct. R. 42(b)(iii)(H).

importance such that appellate review before a final decision on the merits would serve considerations of justice. We agree with the Court of Chancery.

(7) Applications for interlocutory review are addressed to the sound discretion of the Court.⁹ Giving due weight to the Court of Chancery's analysis and in the exercise of our discretion, this Court has concluded that the application for interlocutory review does not meet the strict standards for certification under Supreme Court Rule 42(b). Exceptional circumstances that would merit interlocutory review of the Court of Chancery's decision do not exist in this case, and the potential benefits of interlocutory review do not outweigh the inefficiency, disruption, and probable costs caused by an interlocutory appeal.¹⁰

NOW, THEREFORE, IT IS ORDERED that the interlocutory appeal is REFUSED.

BY THE COURT:

/s/ Tamika R. Montgomery-Reeves
Justice

⁹ Del. Supr. Ct. R. 42(d)(v).

¹⁰ Del. Supr. Ct. R. 42(b)(ii).